

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

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|---------------------------|---|---|
| STATE OF IDAHO,           | ) |   |
|                           | ) | <b>Docket No. 33670</b>                 |
| Plaintiff-Respondent,     | ) |   |
|                           | ) |   |
| v.                        | ) |   |
|                           | ) |   |
| KURT WAYNE STURGIS,       | ) |   |
|                           | ) |   |
| Defendant-Appellant.      | ) |   |
|                           | ) |   |
| <hr/> KURT WAYNE STURGIS, | ) |   |
|                           | ) | <b>Docket No. 34853</b>                 |
| Petitioner-Appellant,     | ) |   |
|                           | ) | <b>2009 Unpublished Opinion No. 492</b> |
| v.                        | ) |   |
|                           | ) | <b>Filed: June 8, 2009</b>              |
| STATE OF IDAHO,           | ) |   |
|                           | ) | <b>Stephen W. Kenyon, Clerk</b>         |
| Respondent.               | ) |   |
|                           | ) | <b>THIS IS AN UNPUBLISHED</b>           |
|                           | ) | <b>OPINION AND SHALL NOT</b>            |
|                           | ) | <b>BE CITED AS AUTHORITY</b>            |
| <hr/>                     | ) |   |

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Gregory M. Culet, District Judge.

Order clarifying denial of motion for new trial, affirmed; order denying application for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent. Rebekah A. Cudé argued.

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SCHWARTZMAN, Judge Pro Tem

In these consolidated cases, Kurt Wayne Sturgis appeals from the district court's order clarifying the denial of his motion for a new trial and the district court's order denying his application for post-conviction relief following an evidentiary hearing. For the reasons set forth below, we affirm.

## **I.**

### **FACTS AND PROCEDURE**

Sturgis was charged with aggravated battery and an enhancement for using a deadly weapon in the commission of a crime for stabbing a man outside of a bar during a fight. Sturgis's parents provided the funds to retain two attorneys who worked as co-counsel during trial. Sturgis's first trial was declared a mistrial after the jury could not reach a unanimous verdict. After his second trial, the jury found Sturgis guilty as charged.

Prior to sentencing, Sturgis's counsel filed a motion for a new trial. The motion asserted that the district court erred in excluding the results of the victim's blood test--which indicated the presence of amphetamine--and by instructing the jury on the statutory elements of simple battery. An initial sentencing hearing was held on May 26, 2004, and the district court began the hearing by entertaining argument on the motion for a new trial. The district court orally denied Sturgis's motion for a new trial and, after a second sentencing hearing, entered a judgment of conviction on June 11, for aggravated battery, I.C. §§ 18-903(a), 18-907(b), with an enhancement for the use of a deadly weapon, I.C. § 19-2520.

Sturgis's counsel filed a notice of appeal on July 15. On September 23, the Supreme Court issued an order conditionally dismissing Sturgis's appeal unless the required fees for preparation of the reporter's transcript and clerk's record were paid within fourteen days. Sturgis's direct appeal was eventually dismissed by the Supreme Court on October 22 for failure to pay those fees. A remittitur was issued on November 15, 2004.

Sturgis filed his application for post-conviction relief on July 5, 2006. The district court held a bifurcated hearing on Sturgis's application. The first day of the hearing related to the timeliness of Sturgis's application; the second day related to the merits of the claims. The district court determined that Sturgis's application was time-barred, and that he was not entitled to equitable tolling. The district court also addressed the merits and concluded that Sturgis had not received ineffective assistance of counsel.

On August 16, 2006, Sturgis filed a motion requesting a status conference on his motion for a new trial. A conference was held on November 3, 2006, and the district court thereafter entered an order clarifying its denial of the motion for new trial. In these consolidated appeals, Sturgis challenges the district court's order of clarification and the district court's denial of his application for post-conviction relief.

## II. ANALYSIS

### A. Motion for a New Trial

Sturgis argues that his appeal from the district court's order clarifying the denial of his motion for new trial allows him to challenge the district court's denial of his original motion for a new trial. The state asserts that Sturgis's appeal is untimely and, therefore, this Court is precluded from reviewing the substantive merits of the district court's denial of his motion for a new trial.

Pursuant to Idaho Appellate Rule 21, failure to file a notice of appeal with the clerk of the district court within the time limits prescribed by the appellate rules deprives the appellate courts of jurisdiction over the appeal. Idaho Appellate Rule 14 provides, in part:

Any appeal . . . may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order, or decree of the district court appealable as a matter of right in any civil or criminal action.

The district court's entry of an amended judgment of conviction, which does not alter any of the terms a defendant wishes to challenge, does not extend the period for filing an appeal or begin that period anew. *State v. Payan*, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996). In that case, the district court entered a judgment of conviction and, forty-three days later, Payan filed a notice of appeal. Thereafter, the district court filed an amended judgment of conviction that granted Payan credit for time served. On appeal to this Court, Payan argued that his appeal was premature pursuant to I.A.R. 17(e)(2),<sup>1</sup> rather than untimely. This Court disagreed, concluding that, because the amended judgment of conviction only differed from the original in granting Payan credit for time served--an issue Payan was not challenging--the amended

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<sup>1</sup> Idaho Appellate Rule 17(e)(2) provides:

A notice of appeal filed from an appealable judgment, order or decree before formal written entry of such document shall become valid upon the filing and the placing the stamp of the clerk of the court on such appealable judgment, order or decree, without refiling the notice of appeal.

As the Court in *Payan* noted, the language in I.A.R. 17 "applies where the trial court rules orally, the notice of appeal is then filed and the trial court subsequently enters a written judgment." *Payan*, 128 Idaho at 867, 920 P.2d at 83.

judgment did not alter the time in which Payan had to file a notice of appeal. This Court noted that the district court could have filed an order granting credit for time served and that order would not have altered the timeline for appeal. The district court's choice to enter an amended judgment of conviction was a difference without a distinction, and this Court concluded that "the period of appeals for all criminal defendants in this state must be enforced uniformly." *Payan*, 128 Idaho at 867, 920 P.2d at 83.

In this case, the jury rendered a guilty verdict on March 10, 2004, which was filed that same day. Sturgis filed a motion for a new trial on April 8 and a contemporaneous memorandum in support. The memorandum argued that Sturgis deserved a new trial because the district court excluded evidence of the results of the victim's blood test, which indicated the presence of amphetamine, and the district court gave a misdemeanor battery instruction to the jury. The district court held the first sentencing hearing for Sturgis on May 26, 2004, and began that hearing by entertaining argument on Sturgis's motion for a new trial. After the arguments, the district court denied Sturgis's motion for a new trial orally on the record. The district court's oral ruling denying Sturgis's motion for a new trial is also reflected in the court minutes from May 26.

Sturgis's judgment of conviction was filed on June 11, 2004. He filed a notice of appeal on July 15, citing as the preliminary issues for appeal the district court's exclusion of the results of the victim's blood test and the inclusion of the misdemeanor battery instruction--the same issues contained in his motion for a new trial. However, Sturgis's direct appeal was eventually dismissed for failure to pay reporter and transcript preparation fees.

On August 16, 2006, over two years after the district court had orally denied Sturgis's motion for a new trial, Sturgis filed a motion requesting a status conference on this motion. A status conference was held on November 3, and the district court entered an order clarifying its denial of Sturgis's motion for a new trial on November 16. The order explained:

Prior to the sentencing date, [Sturgis] filed a motion for a new trial. Oral argument was presented on that motion at the May [26] sentencing hearing, at which time the Court denied the motion. Thereafter, the Court proceeded with the sentencing hearing, which took place on May [26], and June 4, 2004, and eventually sentenced [Sturgis] to [a] term of commitment to the Idaho Department of Correction.

No written order was ever entered on the Court's order of denial of the motion for new trial, although as noted, after denying the motion for new trial the

Court did thereafter proceed to the sentencing hearing and subsequently issued a written judgment and commitment, which was filed on June 11, 2004.

While no written order was ever entered denying the motion for new trial, because such motion and ruling occurred prior to sentencing, this Court deemed the issuance of the written judgment and commitment to be a sufficient order from which the defendant could appeal all appealable issues which occurred prior to the entry of the judgment in the case. However, that issue may still be open for argument.

Accordingly, this written order confirms the Court's order denying the motion for new trial which had been entered on the record at the [May 26], 2004[,] court hearing.

Based on the district court's order clarifying the denial of Sturgis's motion for a new trial, Sturgis filed a notice of appeal on November 17, 2006. Sturgis asserts that his appeal from the district court's order clarifying the denial of his motion for a new trial is timely as to the issues raised in his motion for a new trial. However, the reasoning in *Payan* renders Sturgis's challenge untimely.

Like *Payan*, the order in this case clarifying the denial of Sturgis's motion for a new trial did not alter any of the issues he was challenging with his motion for a new trial. Although the district court did not issue a written order denying Sturgis's motion for a new trial, Sturgis was present at the sentencing hearing when the district court orally denied his motion. Furthermore, after orally denying Sturgis's motion for a new trial, the district court proceeded to sentence Sturgis. Allowing a defendant to reset the time for appeal by convincing a district court to issue an order clarifying the earlier denial of a motion will lead to an inconsistent application of the rules and the timelines they impose. As this Court stated, "the period of appeals for all criminal defendants in this state must be enforced uniformly." *Payan*, 128 Idaho at 867, 920 P.2d at 83.

We therefore conclude that appellate review of the claims contained in Sturgis's original motion is precluded as a matter of procedural law.<sup>2</sup> *See id.* The "Order Clarifying" had no legal effect but to commemorate an order issued two years previously. The notice of appeal in this case is untimely as to the issues related to the denial of Sturgis's original motion for a new trial.

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<sup>2</sup> There is additional support for this conclusion in I.A.R. 17(e)(1). In this case, Sturgis's motion for a new trial was ruled on before the judgment of conviction was entered. Therefore, the district court's denial of Sturgis's motion for new trial would be encompassed in the appeal from his judgment of conviction.

## **B. Post-Conviction Application Merits<sup>3</sup>**

Sturgis asserts that his retained attorneys provided ineffective assistance with relation to his direct appeal and that the district court erred in holding to the contrary. Specifically, Sturgis argues that it was deficient performance by his trial attorneys to permit his direct appeal to be dismissed for failure to pay the estimated costs of preparing the record on appeal. Sturgis seeks, as post-conviction relief, the reinstatement of his direct appeal.

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177.

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<sup>3</sup> The district court first addressed the timeliness of Sturgis's post-conviction application and determined it to be untimely. Because we find the district court's decision addressing the merits of Sturgis's application dispositive, we decline to address the timeliness issue in relation to the doctrine of "equitable tolling." See, e.g., *Chico-Rodriguez v. State*, 141 Idaho 579, 114 P.3d 137 (Ct. App. 2005).

After trial, during which Sturgis was represented by retained co-counsel, a jury found him guilty on March 10, 2004, of aggravated battery and an enhancement for the use of a deadly weapon. The district court entered Sturgis's judgment of conviction on June 11. Sturgis's counsel filed a timely notice of appeal on July 15. The appeal cited as a preliminary statement of the issues the same two issues raised in Sturgis's motion for a new trial--the district court erred in excluding evidence of the results of the victim's blood test, which indicated the presence of amphetamine, and the district court erred in giving a misdemeanor battery instruction to the jury. Included with the notice of appeal was a motion for appointment of appellate counsel and exemption from transcript and record fees based on Sturgis's indigency. Sturgis's retained counsel filed a notice for a hearing on July 23 to discuss appointment of appellate counsel. However, his counsel filed a motion to vacate that hearing on August 24, which stated that counsel was "in the process of obtaining an affidavit" from Sturgis that would "address all the information that would be presented at the currently set hearing." The hearing was vacated<sup>4</sup> and, on September 28, the district court entered an order denying Sturgis's motion for appointment of appellate counsel because the court had "not received any affidavit or information in reference to [Sturgis's] indigency." The order stated that the district court would reconsider the request for appointed appellate counsel if an indigency affidavit was filed.

On September 23, 2004, the Supreme Court issued an order conditionally dismissing Sturgis's appeal "unless the required fees for preparation" of the reporter's transcript and clerk's record were paid "within fourteen (14) days from the date of this Order." Sturgis's direct appeal was dismissed by the Supreme Court on October 22 for failure to pay those fees.

The district court held a hearing on Sturgis's application for post-conviction relief at which both of his retained attorneys, Sturgis, and his mother all testified. The district court found that Sturgis's retained attorneys discussed an appeal with Sturgis after sentencing and later with Sturgis's parents, who had paid all the bills for the attorneys' services. The understanding was that, although Sturgis desired an appeal, Sturgis's parents would be unable to pay for the appeal and neither attorney agreed to represent Sturgis pro bono.

The district court further found that one of Sturgis's retained attorneys mailed him a letter on July 20, 2004, with a proposed affidavit of indigency, but that "Sturgis intentionally did not

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<sup>4</sup> We note that the record does not contain any order to transport Sturgis to that hearing.

sign this affidavit as requested by his counsel.” After the Supreme Court issued the notice conditionally dismissing Sturgis’s appeal, counsel sent Sturgis another letter and proposed affidavit on September 28, which read in pertinent part:

Enclosed for your review and signature is another copy of your Affidavit in Support of Appointment of Appellate Counsel. Also enclosed, please find a copy of the Court’s Order of Conditional Dismissal.

You must sign the enclosed affidavit before a notary and return it to us ASAP, or your appeal will be dismissed. I have enclosed a self-addressed, stamped envelope for your convenience in returning the affidavit.

At the hearing Sturgis testified that he did not sign the indigency affidavit because he was afraid “that was signing [his] life away,” and he “didn’t know who [he] was going to get” as an attorney. The district court determined that Sturgis was aware of his attorneys’ efforts to obtain appointed appellate counsel for him as early as August 2004. In addition, the court found:

Mr. Sturgis testified that he never understood that a determination that he was indigent would eliminate the necessity of either him or his family having to come up with funds to pay Recorder’s Transcript and Clerk’s Records fees. However, based on Mr. Sturgis’ knowledge of his attorneys’ efforts to obtain his affidavit of indigency to prevent the appeal from being dismissed, a reasonable person would and should have concluded that such an affidavit was necessary to save his appeal, and that the issue was urgent to get it completed.

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The court finds that the key factor in the eventual dismissal of Kurt Sturgis’ appeal was his reluctance to go forward with the application for court appointed appellate counsel. Prior to the dismissal of his appeal, he received two requested affidavits that his counsel recommended that he sign, but he intentionally delayed any action (albeit for honest reasons) until it was eventually too late.

Thereafter, the district court concluded:

More significantly, [Sturgis] has not demonstrated that his attorneys’ actions fell below any objective standard of reasonableness in pursuing the appeal. While the record reflects that [retained counsel] did take steps to vacate the court hearing at which the matter of Mr. Sturgis’ indigent status could have been addressed, it was not unreasonable for him to conclude that Sturgis would follow his direct advice and instruction to sign the original affidavit before a prison notary and get it back to [retained counsel] for filing.

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The record reflects that the dismissal of [Sturgis’] appeal was brought about largely by [Sturgis’] unwillingness to follow the advice of counsel and sign an affidavit establishing his indigence. There is no doubt that communications between client and counsel were hampered at the time, but if [Sturgis] had



complied with his counsel's request/instructions and signed such an affidavit in a timely manner, he would have been found to be indigent by the Court and he would not have been required to pay the requisite cost of the reporter's transcript and clerk's record. Thus, the basis for the dismissal of the appeal, non-payment of fees, would have been eliminated.

On appeal to this Court, Sturgis argues that his retained co-counsels' performances were deficient because either attorney could have driven out to the prison to visit Sturgis personally and ensured that he signed the indigency affidavit. We disagree. The record reflects that one of Sturgis's attorneys sent him two letters, both containing indigency affidavits. The second letter contained the Supreme Court's notice of intent to dismiss Sturgis's appeal and informed Sturgis that he needed to complete the affidavit and return it "ASAP" in order to avoid dismissal of the appeal. The district court also noted that the indigency affidavit which Sturgis eventually signed and returned in June 2005 was printed with a 2004 date on it and that someone--presumably Sturgis--had changed the date to 2005 by interlineation. Although either of Sturgis's retained attorneys could have driven out to the prison to visit Sturgis personally, we cannot say that the failure to do so fell below an objective standard of reasonableness as a matter of law. Therefore, the district court's order denying Sturgis's application for post-conviction relief on the merits is affirmed.

### **III.**

#### **CONCLUSION**

Sturgis cannot challenge the denial of his original motion for new trial based upon the district court's later order "clarifying" that denial. Further, Sturgis has not demonstrated that the district court erred in denying his application for post-conviction relief on the merits. Therefore, the district court's original order denying Sturgis's motion for a new trial and the district court's order denying Sturgis's post-conviction application are affirmed.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**